Office-Supreme Court, U.S.
FILED
JAN 14 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinions Below

The opinion of the District Court, which is reported unofficially at 14 Fed. Car. Cases ¶ 81,814, appears in the Transcript of Record at pages 405-416. The order of the Interstate Commerce Commission that is in issue appears in the Record at page 304, and a prior related order of Division 3 of the Commission appears at page 197.

Jurisdiction

The judgment of the District Court was entered on April 11, 1966, and the notice of appeal to this Court was filed on May 3, 1966. Probable jurisdiction was noted on October 17, 1966, —— U.S. ——. The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2325.

Questions Presented

The order of the Interstate Commerce Commission here in issue approved the proposal of Railway Express Agency, Inc. (hereinafter "REA") to issue 20% of its capital stock for sale to The Greyhound Corporation (hereinafter "Greyhound") where the record established that the companies were the nation's principal transporters of package express, that Greyhound's stock interest would be accompanied by a 20% representation on REA's board of directors, that Greyhound intended ultimately to secure a majority stock interest in REA, and that the purpose of both companies in entering into the transaction was to coordinate and consolidate their express activities. The Commission's order was entered, without an evidentiary hearing, under sections 20a(2) and 214 of the Interstate Commerce Act, 29 U.S.C. 20a(2), 314, which required the Commission to determine that the proposed transaction was in the "public interest" and for a "lawful object." The questions presented are:

1. Under the "public interest" and "lawful object" standards of sections 20a(2) and 214, and in view of the Commission's obligation under section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of that Act, 15 U.S.C. 18, was the Commission free to approve the proposed transaction without considering its possible anti-competitive impact?

2. Under sections 20a(2) and 214, was the Commission

obliged to determine whether the proposed transaction would result in an illegal acquisition of "control" by Greyhound of REA within the meaning of section 5(4) of the Interstate Commerce Act, 49 U.S.C. 5(4)?

3. If the Commission did in fact determine that the transaction would not violate section 5(4) because there would be no acquisition of "control," is that finding adequately supported by the record?

4. Does the Commission's order set forth with sufficient clarity the findings and reasons supporting its decision?

Statutes Involved

The statutes involved are portions of sections 7, 11, and 16 of the Clayton Act, 15 U.S.C. 18, 21, 26; portions of sections 5, 20a, and 214 of the Interstate Commerce Act, 49 U.S.C. 5, 20a, 314; and section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), all of which are set forth in the Appendix hereto.

Statement

The fundamental question raised in this case is whether appellee the Interstate Commerce Commission adequately discharged its statutory responsibilities in approving the acquisition by appellee Greyhound—the nation's second ranking carrier of express freight—of a substantial stock and management interest in appellee REA—the first ranking carrier of express freight. Appellants—minority railroad REA stockholders, motor bus competitiors of Greyhound, motor carriers, and freight forwarders—attack the order on essentially three grounds: (1) that the Commission was not free to ignore, as it did, the probable Clayton Act section 7 violation disclosed by the record; [1] (2) that the Com-

[1] For the text of section 7, see Appendix p. 59, *infra*.

mission was obliged also to determine whether the proposed transaction would result in an illegal acquisition by Greyhound of "control" of REA within the meaning of section 5 of the Interstate Commerce Act, 49 U.S.C. 5, and that if its order be read to include a determination that such "control" would not result, the determination is insupportable;[2] and (3) that the Commission's order did not set forth with adequate clarity the grounds supporting its decision and hence is invalid under section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b).[3] Accordingly, apart from the order itself, the relevant facts are principally those that bear upon the relationship to be established between REA and Greyhound—a factor pertinent to both the section 7 issue and the section 5 "control" issue—and upon the potential competitive impact of that relationship. Since the Commission refused to hold a hearing, those facts must be taken from the pleadings before the Commission; and, as we shall indicate, the most revealing pleadings are those filed by REA. However, in this statement we also devote considerable attention to the pleadings filed by appellants, both because the allegations contained therein relate to the potential competitive injury of the proposed transaction and also because, both in the lower court and in motions to affirm in this Court, there have appeared suggestions that the Clayton Act issue was not adequately brought to the attention of the Commission.

1. *REA's application.* This controversy began on October 7, 1964, with an application by REA under sections

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[2] Section 5(4) makes it illegal for one carrier to secure control of another without Commission approval after the type of proceeding required by section 5. For the statutory provisions, see Appendix pp. 64-70, *infra*.

[3] For the text of section 8(b), see Appendix p. 74, *infra*. The Administrative Procedure Act has recently been codified, P.L. 89-554 (Sept. 6, 1966); but no material change was made in section 8(b), which now appears as 5 U.S.C. 557(c), 80 Stat. 387.

20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C. 20a(2), 314, for approval by the Interstate Commerce Commission of the issuance by REA of 500,000 shares of its authorized but unissued stock to Greyhound for a price of $10,000,000 (R. 1-41). REA had almost 2,000,000 shares outstanding (R. 3), so that Greyhound, if the application were granted, would hold 20% of the total REA stock. Section 20a(2) requires carriers subject to Part I of the Act to secure Commission approval for the issuance of securities, and empowers the Commission to approve only if the transaction is "compatible with the public interest," "for some lawful object within [the applicant's] corporate purposes," and "necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier" (App. *infra* p. 71). Section 214 applies section 20a to carriers subject to Part II, such as REA (App. *infra* p. 73). (For the sake of brevity, we hereafter refer only to section 20a.)

In its application, REA asserted that these statutory tests were met because, first, REA needed the purchase money to effect a capital improvements program, and, second, the intercorporate association of the two companies would promote the consolidation and coordination of their express services. As to REA's financial requirements, REA alleged that when its railroad stockholders put it on a profit-and-loss basis on July 1, 1961—it had previously operated on a non-profit basis—"its ratio of debt to capital stock placed it at a disadvantage in attempting to borrow funds"; that its retained earnings would not be sufficient to permit planned expenditures for terminal improvements and acquisition of automotive equipment; and that the $10,000,000 to be paid by Greyhound to REA for its stock would improve the debt to stock ratio and permit the necessary borrowings (R. 5-6).

As to the coordination factor, REA stated that the trans-

action "will give Greyhound a sufficient equity interest in the Applicant to provide a working basis which will justify the Applicant and Greyhound in going forward with the study of, and ultimately entering into an agreement with respect to, the consolidation of certain operating functions and facilities with a view to effecting economies, improving service and increasing public receptivity and patronage" (R. 7).

2. *The REA-Greyhound contract.* A number of provisions of the REA-Greyhound contract, which was annexed to the application (R. 15-18), related to the manner and degree in which Greyhound would participate in REA management and to the parties' mutual purpose of combining their express activities. The contract, which consisted of an October 1, 1964, letter by REA to Greyhound that was accepted by Greyhound, provided for the sale of the 500,000 shares of REA stock at $20.00 a share upon the following terms:

a. The REA by-laws were to be amended to permit Greyhound to name 20% of the REA board of directors.

b. The REA board was to work out a way of securing a cancellation of the outstanding prohibition against payment of dividends.

c. The REA Board was to adopt a resolution "declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage."

d. The REA Board was to adopt a resolution "declaring the intention to consider seriously at a later

time the sale of some REA stock to airlines and/or the general public. . . ."

e. Greyhound offered to purchase up to 1,000,000 additional shares of REA—which would give Greyhound up to a 60% stock interest—from present stockholders at $20 per share for a period of 60 days from the closing of the sale of the 500,000 shares.

These provisions indisputably supported REA's allegation that the transaction would give Greyhound a sufficient interest in REA to promote collaboration between the two companies and that such collaboration was a principal goal of the parties. However, since the consolidation of REA and Greyhound services promised to advantage REA and Greyhound at the expense of their competitors, quite naturally the application triggered objections. Moreover, the potential damage to competition was so severe that the opponents of the proposal included the United States.

3. *Protests against the application.* Petitions to intervene and protests were promptly filed by appellee the United States and by the appellants, who consist of five minority REA railroad stockholders, nine motor carriers, the national association of motor carriers and one of its conferences, the national association of freight forwarders, and seventeen motor bus companies.[4] In addition, one of

[4] More specifically, appellants are: The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Southern Pacific Company; Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver-Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; Consolidated Copperstate Lines; American Trucking Associations, Inc.; Regular Common Carrier Conference; Freight Forwarders Institute; Transcontinental Bus System, Inc.; American Buslines, Inc.; Arkansas-Motor Coaches Ltd., Inc.; Bayshore Bus Lines, Inc.; Continental Bus System, Inc.; Continental Crescent Lines, Inc.; Continental

the appellants, the Southern Pacific Company, filed with the Commission a complaint under section 5(7) of the Interstate Commerce Act, 49 U.S.C. 5(7). Taken together, these pleadings alleged the necessity of a hearing so that the Commission could explore the questions whether the proposed transaction would result in acquisition by Greyhound of "control" of REA, which could only be authorized in a proceeding under section 5 of the Interstate Commerce Act, and whether the transaction would result in such serious competitive injury as to be proscribed by section 7 of the Clayton Act or in any event to be incompatible with the "public interest" standard of section 20a(2).

Thus, the petitions of the Freight Forwarders Institute, the dissident railroad stockholders, and the motor carriers, while asserting the illegality of the transaction in open-ended terms, dealt explicitly only with the section 5 question (R. 42-52, 63-64, 68-70, 79-82), as did Southern Pacific's section 5(7) complaint (R. 180-184). On the other hand, appellant motor bus competitors of Greyhound focused primarily upon the damage to their express business that might result from the proposed transaction. After pointing out that they were carriers of express in competition with both Greyhound and REA, these appellants alleged in part as follows:

> "The Greyhound Corporation is a holding company which controls the largest motorbus company in the world, i.e., Greyhound Lines, Inc. . . . Railway Express Agency, Inc. . . . is the world's largest express company.

Panhandle Lines, Inc.; Continental Southern Lines, Inc.; Continental Tennessee Lines, Inc.; Denver-Colorado Springs-Pueblo Motorway; Denver-Salt Lake-Pacific Stages, Inc.; Continental Pacific Lines, Inc.; Midwest Buslines, Inc.; Smoky Mountain Stages, Inc.; Tennessee Trailways, Inc.; Union Bus Lines, Inc.; and Muscatine, Davenport and Clinton Bus Company.

> "Under this proposal Greyhound would acquire 20% of the stock of R.E.A., and this, in connection with other aspects of the application, present matters of grave concern to the Petitioners. The Applicant has stated in its application that the proposal will 'provide a working basis' for R.E.A. and Greyhound 'entering into an agreement with respect to, *the consolidation of certain operating functions and facilities* . . .' (Page 7 application. Emphasis added) [.] No motorbus company could hope to meet the competition offered by a consolidation of the R.E.A. and Greyhound terminal facilities and operations. It would, in effect, destroy all competition in the package express phase of motorbus transportation, and would, therefore, not be compatible with the public interest" (R. 58).

Similarly, the National Trailways Bus System, an association of which appellant motor bus companies are members,[5] stressed the critical importance of express revenues to the motor bus companies that compete with Greyhound:

> "The member carriers of National Trailways Bus System consider the transportation of express throughout the United States as a vital and indispensable source of revenue. In many instances, the transportation of express by these member carriers will provide the difference between a profit and a loss in the over all transportation activities of these carriers. In those instances, therefore, it is imperative that the express traffic which these carriers are now handling be continued or otherwise substantial deficits will surely result thereby impairing the ability of many member carriers to continue serving the public" (R. 61).

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[5] The association, as such, is not an appellant.

Finally, the Department of Justice stated forcefully and clearly its conviction that the REA application raised "serious" Clayton Act questions that the Commission was obliged to resolve. While the Department said that it did not "at this time" take the position that the transaction would violate section 5—although it "recognize[d] that the proposed transaction and the agreements related thereto raise serious questions of Greyhound control or power to control REA"—the Department continued:

> "But no matter what the Commission may do about instituting a section 5 control proceeding, petitioner asserts that the application places before the Commission serious questions under section 7 of the Clayton Act which by virtue of section 11 thereof the Commission has a duty to enforce. Greyhound will, if the Commission approves this application, acquire a substantial stock interest in REA and establish a working basis with REA to enter into agreements of mutual advantage. Competitors of REA and Greyhound have asserted in papers filed with the Commission that they will be competitively disadvantaged by the proposed transaction. Their protests are tantamount to allegations that the effects of the proposed transaction may be substantially to lessen competition or to tend to create a monopoly. Therefore, the Commission in accordance with its responsibilities under section 11, cannot avoid determining to what extent, if any, the proposed transaction would result in effects which section 7 of the Clayton Act is intended to prevent" (R. 77-78).

4. *Additional data submitted by REA.* After these protests had been filed, REA, in response to a request by the Commission for further information, supplied details re-

specting the transaction that underscored the seriousness of both the section 7 Clayton Act and the section 5 "control" questions. The most significant features of the negotiations between REA and Greyhound, which we describe fully below, were that Greyhound initially tried to secure majority stock control; that this attempt was frustrated by minority REA stockholders who held a right of first refusal on stock sales by the REA stockholders; that Greyhound's acknowledged purpose was, not to acquire the stock for investment purposes, but to achieve a "coordination" of REA and Greyhound express service; that the Board and management of REA shared that goal; that Greyhound and REA reached tentative agreements upon the particular types of "coordination" that would be beneficial; that those agreements reflected a desire virtually to eliminate competition between the two companies; that, pending a change of heart by the REA minority stockholders, Greyhound believed that a 20% stock interest would be a sufficient basis for effecting coordination, provided that its purchase offer was approved by a large enough majority of REA stockholders so that the cooperation of REA management would be assured; and that in fact over 80% of REA stockholders did accept. In more detail, the data supplied by REA disclosed the following:

In January of 1964, Greyhound "approached REA with a proposal . . . to acquire a controlling interest in REA" (R. 82). On the basis of discussions with REA directors, Greyhound had concluded that "there may be an interest on the part of many of the shareholders of REA in disposing of their stock" (R. 93-94). Accordingly, Greyhound submitted a tentative proposal under which Greyhound would offer $25.00 per share for all outstanding REA stock, provided that it acquired at least 67% of that stock, 16% of which it intended to offer to the "major airlines" (R. 93-

97).[6] The REA board of directors requested Greyhound to make a formal offer along those lines (R. 83), which it did in the form of a letter to REA stockholders dated February 21, 1964, asking them to indicate if they assented (R. 99-101). The REA board took no position on this offer (R. 83).

While the record does not disclose in any detail what happened respecting this Greyhound offer, REA represented generally to the Commission that the offer was unsuccessful because some REA stockholders, who held a right of first refusal on offers to sell by other stockholders, indicated they would exercise that right if the stock were offered to Greyhound (R. 83).

In order to circumvent this obstacle to Greyhound's securing an interest in REA, the parties directed their attention to "the possibility of Greyhound's acquisition of 500,000 shares of authorized but unissued REA stock, these shares not being subject to the right of first refusal" (R. 83). The record does not reveal the particulars of the ensuing negotiations, but it is clear at any rate that on July 7, 1964, the REA board of directors approved "in principle" the suggestion of Greyhound that it acquire a 20% REA stock interest together with a 20% representation on the REA board (R. 106-108).

Thereupon Greyhound submitted a formal offer that bared with remarkable clarity Greyhound's ultimate design. Greyhound stated that its "interest in REA . . . stems primarily from our views as to the improvements . . . which could be realized through combination and correlation of certain of our facilities and services"; that the "studies which we have made separately and jointly with your rep-

[6] This desire to include "major airlines" as REA stockholders carried through, as we have noted (*supra* p. 6-7), to the final contract. While Greyhound's purpose is not explained on the record, it is reasonable to infer that Greyhound's ultimate desire is to enlist the cooperation of the airlines in the "coordination" of air express service.

resentatives confirm that there are tremendous possibilities in these respects''; but that ''in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in REA . . . .'' Accordingly, Greyhound incorporated in its offer the requirement that REA commit itself to ''consider seriously and work toward a long-term agreement between REA and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies to be shared by REA and Greyhound . . . .'' Greyhound also stated that it would accept additional REA shares, but that it did not insist upon more than a 20% interest because it did not want controversy with REA minority stockholders to ''delay'' or ''frustrate completely'' the contemplated ''improvements in service.'' Thus, Greyhound was willing to ''leave to the future'' the question of further stock acquisitions (R. 109-112).

While the ''studies'' between REA and Greyhound respecting ''combination and correlation'' of facilities and services are not in general described in the record, there is one important exception—a 2½ day conference between officers of the companies held about three weeks before the REA board approved ''in principle'' the 20% stock transaction. That conference concluded with a ''Memorandum of Understanding'' respecting ''Potential Benefits By Consolidation or Merger of Certain Activities of the Two Companies'' (R. 149-158). The provisions of this document—a blueprint for the elimination of competition—are described in detail in the margin.[7] What was contemplated, in brief,

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[7] The memorandum may be summarized as follows:

1. Because Greyhound's terminal facilities are strained and becoming more and more inadequate, it would use REA's and "REA would perform the terminal services, other than loading and unloading of buses. . . ."

2. Greyhound would take over the service and maintenance work on all REA automotive equipment in 37 cities where now each has garage opera-

was a fusion of REA and Greyhound express activities. Thus, from the physical standpoint, REA and Greyhound would combine their terminals, their depot and express office facilities, their service and maintenance work, their communication, data processing, and accounting facilities and procedures, their safety supervisors and line representatives, and their research activities. From a sales stand-

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tions, and perhaps in 11 more cities. Moreover, Greyhound has "headquarters staff and field supervision sufficient with the addition of a few people to take care of the staff work and field supervision on all REA automotive equipment."

3. REA and Greyhound would utilize "joint communication facilities and the present and proposed data processing system and machine accounting of REA," and they would use to the extent possible joint billing and accounting procedures.

4. The two companies would use the same salesmen and the same advertising program and agency.

5. Wherever REA express depot and express office facilities were satisfactory among the 683 points where both companies have such facilities, Greyhound could use the REA facilities.

6. There is a "very strong possibility . . . for what could be termed a package bus distribution service tied in with REA's Air Express, highway or rail operations." Thus, as to Air Express, off-airline points could be reached by tacking on Greyhound bus express. And "[r]ail-bus express service would create a new capability for the two carriers to compete in the ltl [less-than-truckload] market."

7. Because Greyhound has about 50% excess capacity at the present between other than principal cities, it "could and would offer to REA an attractive linehaul cost" so that REA could utilize Greyhound's capacity instead of using its own trucks or third party trucks. "This will eliminate the expense of REA's over-the-road operations in this category or the third party truck routes. . . ."

8. "Other possibilities" include:

a. Joint purchasing.
b. REA's utilizing Greyhound's highway safety supervisors and line representatives.
c. Greyhound's using REA's research group.
d. "[A] possibility of some consolidated effort or assistance between the Boothe Leasing Corporation of Greyhound and REA Leasing Corporation."
e. Greyhound's using REA to perform pick-up and delivery for its express movements.
f. Greyhound's subsidiary, Greyhound Van Lines, could, as to less than van load volume, have REA provide a rail container service.
g. Again as to Greyhound Van Lines, REA could act as sales agent.

point, they would use the same salesmen, the same agency, and the same advertising program. And, from an operational standpoint, Greyhound would use REA to perform terminal and pickup and delivery services on Greyhound's express movements; REA would use Greyhound's express service to tack on to REA's air and railway express service to reach off-airline and off-rail points; and Greyhound would offer REA an especially attractive arrangement for employing Greyhound instead of REA or third-party trucks to perform the underlying transportation for REA express service between other than principal cities, where Greyhound has about 50% excess capacity. The projected advantages of this blending of the services and facilities of the two companies was, in addition to the paring of costs, "a substantial improvement volume-wise for both Greyhound and REA . . . estimated to be $9,600,000 for REA and $3,900,000 for Greyhound"—for Greyhound, more than doubling its annual growth of express revenue (R. 149, 156).

Despite the REA board's approval "in principle" of the Greyhound proposal, that proposal was not entirely satisfactory to the board in respects not here material. Accordingly, at its meeting of July 28, 1964, the board appointed a committee to attempt to negotiate certain changes (R. 112-113). The report of that committee after conferences with Greyhound further emphasized that express service collaboration was Greyhound's central object.

Thus, the REA committee stated that Greyhound "was reluctant to make another formal offer to REA because it was not clear to them . . . that such a proposal would receive sufficient support from this Board and the REA stockholders to insure that a satisfactory working agreement between REA and Greyhound would be possible." However, according to the REA committee, Greyhound would "look

favorably upon a firm offer from REA . . . if it were adopted by such a substantial vote of the REA Board and stockholders as to carry some measure of assurance that a constructive working relationship could be developed" (R. 115).

The ensuing events confirmed, if confirmation were necessary, that REA was just as intent upon express service collaboration as Greyhound. At the meeting at which final action was to be taken by the REA board, REA's President stated that "in the opinion of the management of REA it would be greatly in the interest of REA" to sell the stock to Greyhound "and to enter into working arrangements with Greyhound which would result in substantial savings for REA and improved service to the public" (R. 115). Accordingly, the board voted 14-3—the "substantial vote" desired by Greyhound to insure the cooperation of REA management—that REA make Greyhound the offer that became the final contract, and that it also pass the resolutions required by Greyhound respecting, *inter alia,* REA's "intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities. . ." (R. 114-125).

The REA board thereupon called a stockholders' meeting to approve the offer. The board's proxy statement recommended approval, and described the negotiations in terms of Greyhound's "obtaining an equity interest in the Corporation with the ultimate purpose of achieving certain economies which could be realized through combination and correlation of certain of the facilities and services of Greyhound and the Corporation" (R. 127, 126-136). Reflecting Greyhound's stated desire for heavy support from REA for the proposal, the proxy statement expressed the opinion of REA's management that Greyhound would probably accept the offer "if said proposals are

adopted by a substantial vote of the stockholders. . .'' (R. 130). The stockholders approved by over an 80% majority, and Greyhound accepted the REA offer, as indicated at the outset of this statement, on October 6, 1964 (R. 84-85).

With the filing by REA of the documents disclosing the foregoing facts, Division 3 of the Commission, before whom the case was pending, had before it all of the allegations and representations upon the basis of which it was to decide whether to hold a hearing or to grant or deny the application without hearing. Except for some later representations respecting competitive injury (*infra* pp. 20-22), which were essentially cumulative, the remaining history of the litigation is material principally to the issue respecting the ambiguity of the Commission's order. In that connection, we next outline briefly the legal position adopted by REA, as well as by the appellants on petitions for reconsideration, and discuss the two orders that were entered by the Commission.

5. *REA's reply to protests.* In its reply to the allegations of interveners, REA urged that its application be approved without a hearing because ''questions of 'control' and effect upon competition are premature in this proceeding and without factual basis'' (R. 159, 160). As to the Justice Department's ''attempt to expand this 20a proceeding into a most novel proceeding involving Section 7 of the Clayton Act'' (R. 165), REA maintained that ''[t]he purchase by Greyhound of a $10,000,000 interest in REA cannot in itself be a violation of Section 7,'' and that if there were collaboration between the two companies in the future ''the Department has an adequate forum at that time to challenge'' such collaboration (R. 166). Thus, REA's views underwent a significant transformation: REA now urged that it would be ''premature'' to consider one of the two reasons—prospective coordination of express services—that in its appli-

cation it had pressed upon the Commission as a reason why the "public interest" would be served by the transaction. See *supra,* pp. 5-6.

As to the section 5 "control" question, REA maintained that "the documents filed with the Commission by REA establish that the proposed stock issue will not give Greyhound such control" because it would have only a minority stock and board representation position. Furthermore, REA maintained that any consideration of the possible impact of Greyhound's 60-day offer to purchase another 1,000,000 shares would be "premature" because the dissident REA stockholders would be able to block any such purchases by exercising their right of first refusal.

6. *Division 3's order.* The Commission's initial order on the merits was issued by Division 3 on March 15, 1965 (R. 197-202).[8] While the Commission's order is hardly a model of clarity, so far as one can tell the Commission accepted REA's contention that it need not consider the probable anticompetitive impact of the proposed stock acquisition. The Commission, of course, was obliged to acknowledge that the section 7 argument had been made; but the Commission disposed of the issue by stating simply that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of . . . section 7 of the Clayton Act, would not be appropriate at this time . . ." (R. 198). The Commission did not indicate why such an investigation would not be "appropriate," and said not one more word about the effect of the acquisition upon competition.

The Commission also held that a section 5 investigation "would not be appropriate at this time" (R. 198). In this connection the Commission did provide some amplification,

[8] In other orders the Commission granted the various motions to intervene (R. 170-171, 179-180).

albeit obscure. As we read the order, it appears that the Commission accepted REA's contention that it would be premature to consider possible developments pursuant to Greyhound's 60-day offer, since "if in the future the acquisition of control . . . becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition" (R. 201). And as to the 20% transaction alone, again the Commission appears to have agreed with REA that this transaction did not confer "control" upon Greyhound because:

> ". . . [Greyhound] was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities. . . ." (R. 200-201).

Having brushed aside as irrelevant the question of the anticompetitive impact of the acquisition, and having held that the record did not disclose that "control" would be either "imminent or apparent," the Commission concluded that there were no factors to balance against REA's claim

that it needed the purchase money. Accordingly, the Commission approved the stock issuance on the basis of fiscal considerations.[9]

7. *Petitions for reconsideration.* All of the protestants except the Department of Justice and one REA stockholder filed petitions for reconsideration. That of appellant motor bus companies is particularly relevant, since it dealt at length with the failure of the Commission to resolve the question of adverse impact upon competition. Those appellants alleged that, in the light of the avowed intent of REA and Greyhound, the Commission's order "means a consolidation of the operating functions and facilities of the largest motorbus company in the world (who derived $30,220,460.00 in 1963 from the transportation of express in the same vehicle with passengers) and the largest express company in the world." This, in turn, would "in effect destroy all competition in the package express phase of motorbus transportation," for "[n]o motorbus company could hope to meet the competition offered by such a consolidation." Since [m]any of the [appellants'] passenger operations are dependent upon express revenue in order to render continuous and adequate service to the public," the projected coordination of REA and Greyhound activities would "result in a restraint of competition and would not be compatible with the public interest." Appellants concluded that a hearing was "imperative," for "[t]he evidence of express revenue subject to diversion consists of voluminous and complicated exhibits," and the "competitive harm . . . cannot properly

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[9] "*It further appearing,* That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000 . . ." (R. 200).

be developed without the introduction of voluminous exhibits and extensive testimony . . ." (R. 219, 222).

Other protestants, in their petitions for reconsideration, also urged that the Commission erred in failing to consider the section 7 question involved in the transaction between the "nation's second largest transporter of express traffic" and the "largest transporter of express traffic" (R. 264, 267), and in addition contended that, contrary to the Commission's finding, the record disclosed the probability of an illegal acquisition of "control" that was relevant to the "public interest" standard of section 20a(2) (R. 224-225, 265).

In reply, REA asserted that the Commission had correctly concluded that the proposed transaction would not give Greyhound control of REA (R. 278-282), and also—evidently in the alternative—that in any event "questions of effect upon competition and 'control' are irrelevant in this Section 20a proceeding" because the purpose of that provision is restricted to insuring "the integrity of carrier securities" (R. 275). REA also argued, as it had before, that the stock purchase "cannot in itself be a violation of Section 7," so that it was "premature to speculate as to the lawfulness" of coordination agreements that might be made between REA and Greyhound in the future (R. 277-278, 287).

On May 28, 1965, Division 3, acting as an appellate division reviewing its own decision, denied the petitions for reconsideration on the ground that they "presented no error of fact or law" (R. 289-290).

8. *Institution of the lawsuit and the Commission's final order.* On June 7, 1965, the motor bus appellants filed with the Commission a petition for review by the full Commission on the ground that the case involved an issue of "general transportation importance." See Rules of the Commission, Rule 101(a)(4), 49 C.F.R. §1.101(a)(4). The principal

ground alleged was that "many of [appellant motor bus companies'] passenger operations are dependent upon express revenue," and that the "combined efforts of R.E.A. and Greyhound will place [appellants] in the position of being unable to compete with them for express revenue and would only result in a restraint of competition, which result is clearly incompatible with the public interest" (R. 300-301).

Nine days later, appellant railroads filed suit in the United States District Court for the District of Colorado seeking to have set aside the March 15, 1965, order of Division 3; and within the next month the appellant trucking companies and associations and the appellant Freight Forwarders Institute filed their complaints in intervention.

Shortly thereafter, on August 11, 1965, the full Commission entered its final order on the merits—the order that is under attack in this proceeding. In that order, the Commission "recalled" the case from Division 3, "vacated and set aside" Division 3's order of May 28, 1965 denying the petitions for reconsideration, "reopened" the case "for reconsideration on the present record," and disposed of the case with the following single sentence: "*It is further ordered,* Upon reconsideration, that the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed" (R. 303-304).

Appellants' complaints were, accordingly, amended to seek relief from this final order of the full Commission (R. 371-372, 386-387, 390-391, 397).

9. *The District Court's decision.* On April 11, 1966, the District Court issued its judgment upholding the Commission (R. 417). As the Court interpreted the Commission's order, the Commission had refrained from deciding any question relating to the anti-competitive character of the transaction or the acquisition of "control" of REA by

Greyhound—although, as we have indicated (*supra*, p. 21), the pleadings before the Commission on the petitions for rehearing disclosed that all parties agreed that Division 3 *had* held that the 20% acquisition would not result in such a "control" relationship. The court held that, while in an appropriate case such Clayton Act and "control" questions should be considered in a section 20a(2) proceeding, in this particular case the Commission "took the proper course" because all of the relevant facts would not be known until expiration of Greyhound's 60-day offer to purchase an additional 1,000,000 shares of REA stock. Moreover, as to the question whether the Commission's order adequately set forth the grounds for the decision, the Court held that the order "is clear and understandable and presents an adequate basis for judicial review" (R. 416).

Summary of Argument

A. First, the Commission should not have approved the stock transaction without considering the probable Clayton Act violation disclosed by the record.

1. The proposed transaction, so far as the record discloses, would probably violate section 7 of the Clayton Act. Acquisition of a minority stock interest may violate that provision. *E.g., United States* v. *DuPont & Co.*, 353 U.S. 586. Moreover, it is probable that REA and Greyhound together dominate an identifiable "line of commerce"—the transportation of express. "The Commission has consistently recognized certain fundamental differences between express service and ordinary freight service." *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952). Those differences in the main have to do with expedited delivery. See decisions cited *infra*, pp. 32-33. And, as to express service, the record indicates that a hear-

ing would probably establish that REA is the first-ranking carrier and Greyhound the second, and that together they dominate the market.

Given this market position, the other facts of record establish a *prima facie* violation. Greyhound started out to secure a majority stock interest in REA and still plans to do so if the opposition of a few REA stockholders abates. In the meantime, Greyhound believes that a 20% stock interest and a 20% representation on REA's board of directors will serve its purpose, since that purpose is shared by REA management, the majority of REA directors, and the holders of over 80% of REA's stock. And that purpose is to effect a consolidation of REA and Greyhound express activities. Such an elimination of competition will impair the opportunity of third party express carriers to compete with Greyhound for REA business, with REA for Greyhound business, and with both of them for the patronage of the public. The impact upon the motor bus competitors of Greyhound would probably be particularly severe, since the record indicates that the profitability of many of their passenger routes is dependent upon express revenue.

2. In the section 20a(2) proceeding, the Commission was obliged by virtue of the "public interest" and "lawful object" standards of the statute to consider the probable anticompetitive impact of the proposed transaction. Similar terms in similar statutes have uniformly been construed to require consideration of the basic policies of the antitrust laws. See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67; *California* v. *Federal Power Commission*, 369 U.S. 482, 484-485. Moreover, while the legislative history of section 20a(2) indicates that the Congress' primary concern was to prevent fiscal manipulation, nothing in that legislative history suggests that the Congress intended that the broad terms it employed—"public interest" and "lawful object"

—be given less than their normal meaning. Finally, to read the statute restrictively, so that the Commission could approve a securities transaction notwithstanding an apparent section 7 Clayton Act violation, would be to subvert two other statutory provisions—section 11 of the Clayton Act, which requires the Commission to enforce section 7 against carriers, and section 16 of the Clayton Act, which disables private persons from securing judicial injunctive relief respecting transactions that are within the Commission's Clayton Act jurisdiction.

3. Even if the terms of section 20a(2) were not broad enough in themselves to require consideration of the anti-competitive features of the proposed transaction, the Commission, by virtue of its obligation under section 11 of the Clayton Act to enforce section 7, was not free to ignore an apparent violation that was disclosed in the course of the section 20a(2) proceeding. Otherwise the Commission's section 20a(2) approval would be an instrument for the violation of another statute it is required to enforce.

4. The possible results of Greyhound's 60-day offer to purchase up to an additional 1,000,000 shares of REA stock did not make it premature to consider the section 7 question in the section 20a(2) proceeding. In the first place, it is doubtful that the Commission could in any circumstances approve a transaction that would probably violate section 7, since section 11 of the Clayton Act obliges the Commission in mandatory terms to proceed promptly against such violations. In the second place, if the Commission has any discretion in this respect, surely the circumstances would have to be compelling to warrant bypassing the section 7 issue, and there are no such circumstances here. If the Commission thought it preferable to know the results of the 60-day offer before conducting a hearing, it could have

denied section 20a(2) approval on the ground that the "public interest" and "lawful object" standards were not met on the record as made, but that REA could reapply if the parties reformed their contract so that the 60-day offer would expire prior to the Commission's action under section 20a(2). On the other hand, the price of ignoring the section 7 question in the section 20a(2) hearing may be the infliction of substantial competitive damage, since even if the Commission ultimately were to conduct some proceeding in which the anticompetitive impact of the transaction would be considered there would still be a substantial period of time in which the intercorporate relationship would be in effect. In this connection, the vulnerability of the motor bus competitors of Greyhound is particularly relevant.

Moreover, no possible outcome of the 60-day offer could eliminate the probability of a section 7 violation. Even if 1,000,000 shares were offered to Greyhound and the appellant minority railroads were to purchase those shares by exercising their prior rights (thereby giving them as a group slightly less than 50% of the stock), Greyhound's 20% interest would probably nonetheless violate section 7 in view of Greyhound's position on REA's board, together with its ultimate purpose of acquiring control. The leading relevant decisions are *Briggs Manufacturing Company* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960), *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), and *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd* 206 F.2d 738 (2d Cir. 1953), in all of which acquisitions of about 20% interests were held to violate section 7 despite the fact that the majority interests were vigorously opposed to the acquisition.

Finally, upon the termination of the section 20a(2) proceeding, appellants may be without an enforcible right to secure adjudication of the section 7 question, since section 16 of the Clayton Act bars private injunctive relief respecting cases within the Commission's jurisdiction.

B. The Commission erred in dealing with the section 5 "control" question. While the lower court held that the Commission did not make any ruling respecting the contention that the 20% transaction would give Greyhound "control" of REA and hence would be illegal absent Commission approval after a section 5 proceeding, Division 3's order clearly held that there would not be such "control." That determination was in error under the rule established by this Court that, under section 5, the term "acquire control" includes the establishment of any relationship, formal or informal, that "accomplish[es] a significant increase in the power of one [company] over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease[.]" *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169.

If, however, our reading of the order is incorrect, and the Commission made no section 5 determination, then it erred for essentially the same reasons set forth above respecting its bypassing of the section 7 issue.

C. The order does not comply with section 8(b) of the Administrative Procedure Act, for it does not set forth with adequate clarity the grounds supporting the decision. The final order of the full Commission contains no discussion whatever, and is plainly invalid under section 8(b). But even if it be thought that the Commission intended to

adopt the prior order of Division 3, the outcome should be the same, since that order is hopelessly obscure. As to section 5, at one point the Division said it would not be "appropriate" to make a determination, but at another point it made such a determination. As to section 7, the Division said only that an investigation would "not be appropriate at this time." The Division did not suggest *why* it would not be appropriate—whether it wished to await the outcome of the 60-day offer, whether it believed section 7 questions were outside the scope of a section 20a(2) proceeding, whether it wished to see what particular plans of coordination were adopted by REA and Greyhound, whether it thought that the record did not suggest a section 7 violation, whether it believed that section 20a(2) approval would immunize the transaction, whether it thought the administrative burden would be too great at the moment, or whether it had some wholly unrelated reason. In short, the Commission "sheltered behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the courts] to determine what really lay behind the conclusions. . . ." *Automatic Canteen Co.* v. *F.T.C.* 346 U.S. 61, 81.

Argument

Before analyzing in detail the legal issues raised in this appeal, we sketch at this point the general contours of the case.

Our argument in brief is as follows: First, we say that the Commission could not approve the proposed stock acquisition while ignoring the facts of record that established the probability of a violation of section 7 of the Clayton Act. The Commission's obligation to consider section 7 issues in a section 20a(2) stock issuance proceeding arises by virtue of the "public interest" and "lawful object" standards of section 20a(2); and that obligation is underscored by the Commission's responsibility under section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of that Act against carriers, as well as by the disability of private parties, because of section 16 of the Clayton Act, 15 U.S.C. 26, to secure judicial injunctive relief respecting transactions falling within the Commission's Clayton Act jurisdiction.

Our second contention is similar: The Commission could not approve the transaction as in the "public interest" and for a "lawful object" without determining whether it would result in an acquisition of "control" illegal under section 5 of the Interstate Commerce Act. However, analysis of the section 5 question is complicated by virtue of the character of Division 3's March 15th order, in which at one point the Division held that "control" would not result but at another held that it was "premature" to consider questions of control. To the extent that the Commission did determine that there would be no violation of section 5, our position is that the determination was not supported by the record.

Our third contention is that the Commission failed to explain adequately the basis for its action. As we have indicated, the final order by the full Commission gave no

reason whatever for affirming the action of Division 3; and even if it be assumed that the Commission, without saying so, adopted the discussion contained in Division 3's March 15th order, analysis is not advanced because that order itself is sorely deficient. As to section 5, as we have indicated, the Division at one point ruled on the merits and at another refrained from ruling; and as to section 7 all that one can tell is that Division 3 believed it would "not be appropriate at this time" to consider the issue.

The lower court thought that the Division's decision to bypass the section 7 issue was grounded exclusively upon a belief that it would not be desirable to resolve that issue prior to the expiration of Greyhound's 60-day offer to purchase an additional 1,000,000 shares of REA stock. But the phrase "not be appropriate at this time" could just as easily have reflected the Division's belief that, as REA had argued, the stock acquisition itself could not violate section 7 and that the Commission should wait to see if any anti-competitive agreements would actually be made. Or the Division might also have meant that, as REA also had argued, section 7 questions are beyond the scope of a section 20a(2) proceeding and should be postponed to a Clayton Act proceeding.

While these alternative interpretations of Division 3's order do not by any means fully catalogue the possible interpretations of that order—much less of the full Commission's order—they illustrate how this sort of default by an agency in explaining its action impedes judicial review.

If we are correct in our view that the Commission's order is fatally defective because of its ambiguity, presumably we would only be obliged to demonstrate the invalidity of one of the possible constructions of the order to secure a remand to the Commission for clarification. However, we believe that there is no conceivable ground upon which the

Commission's action could be sustained, and that the case should be remanded either for denial of the REA application or for an evidentiary hearing. Accordingly, in the following portions of our brief we discuss each of the rationales that has, by one party or another and at one time or another, been suggested as a possible basis for the Commission's action both as to the section 7 and as to the section 5 issues.

A. *The Commission Erred In Refusing To Consider The Impact Of The Proposed Transaction Upon Competition.*

In this part of our brief, we show that the record before the Commission disclosed a probable section 7 Clayton Act violation and that in such circumstances the Commission was obliged to consider the section 7 question in the section 20a(2) proceeding.

1. *The probable anti-competitive impact of the REA-Greyhound Transaction.* As we have noted (*supra,* pp. 17, 21), REA argued to the Commision that the stock acquisition standing alone would not violate section 7 of the Clayton Act, and that, if any anti-competitive actions were taken by REA and Greyhound in the wake of the acquisition, either the Commission or the Justice Department could institute a Clayton Act proceeding. Conceivably Division 3 adopted this view in ruling that consideration of the section 7 issue would not be "appropriate." But the fact is that, as the Justice Department asserted in the Commission proceedings, the record "place[d] before the Commission serious questions under section 7 of the Clayton Act" (*supra,* p. 10).

First, the type of transaction—acquisition by one company of a minority stock interest in another—is within the "whole or any part of the stock" phrase of section 7. See *United States* v. *Du Pont & Co.,* 353 U.S. 586 (23% stock

interest); *Briggs Manufacturing Co.* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960) (22% interest); *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) (23% interest); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953) (24% interest).

Second, it appears likely that Greyhound and REA dominate an identifiable "line of commerce"—the transportation of express. Protestants alleged before the Commission in substance that express transportation was the relevant market (*supra*, pp. 8-10, 20-21), and the Commission did not find to the contrary. This is hardly surprising, since "[t]he Commission has consistently recognized certain fundamental differences between express service and ordinary freight service. . . ." *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 135 (1952).[10] Traditionally, express service has been differentiated from other types of transportation primarily in terms of expedited delivery. The service, which has generally been confined to relatively small packages, normally commands a premium price and therefore is normally employed for items of more than ordinary value.[11] See, *e.g.*, *Coordination of Motor Transportation*, 182 I.C.C. 263, 348 (1932); *San Francisco Whole-*

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[10] Thus the Commission issues certificates in terms of express carriage and forbids both REA and motor carriers whose certificates limit them to express service from engaging in non-express carriage. See, *e.g.*, *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131 (1952), 63 M.C.C. 573 (1955); *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332 (D. Mass. 1963), *aff'd*, 376 U.S. 514; *Mistletoe Exp. Service Extension—Texas*, 61 M.C.C. 737, 744-745 (1953); *Railway Express Agency, Inc., Ext.—Durant-Kosciusko*, 34 M.C.C. 111, 114 (1942); *Railway Express Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363, 371 (1941).

[11] It is true that REA has recently entered the field of relatively large

sale Dairy Produce Exc. v. *American Ry. Exp. Co.*, 78 I.C.C. 737, 740 (1923); *R.R. Commissioners of Florida* v. *Southern Express Co.*, 44 I.C.C. 645, 647 (1917); *Davies Spur, Wash., Express Rates*, 43 I.C.C. 143, 146 (1917); *Kindel* v. *Adams Express Co.*, 13 I.C.C. 475 (1908). Thus, while no final conclusion respecting definition of market can be made without a hearing, surely there is every reason to believe that the express market is sufficiently distinctive to be the relevant market for purposes of appraising the probable anti-competitive impact of the proposed transaction.

As to the share of this market controlled by REA and Greyhound, once again there is no Commission finding because the Commission refused to explore the section 7 question. However, it was alleged in the Commission proceeding that REA and Greyhound are respectively the first and second ranking carriers of express (*supra*, pp. 8-10, 20-21); and, of course, the Commission knew this to be true, as does anyone familiar with the transportation industry. Moreover, data subject to judicial notice, and brought to the attention of the lower court, suggest that REA has a virtual monopoly of express traffic, with Greyhound its only substantial competitor. Thus, the annual reports filed by carriers with the Commission indicate that in 1964 REA,

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shipments, and that in *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass. 1966), *aff'd* — U.S. —, 87 Sup. Ct. 407, it was held that REA's authority to carry express is broad enough to permit the transportation of containerized freight weighing up to 3,000 pounds. But this does not, of course, mean that REA no longer considers itself primarily engaged in providing the traditional type of small package express service. As REA's President testified to the Congress in the spring of 1966, "It is not true that we are a heavy shipment carrier, like a motor carrier. We are still in small package business. Our average package weighs 30 pounds, and we have 60 percent of our business, or over 34 million shipments weighed less than 40 pounds. . . ." Hearings before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service on H.R. 12367 and related bills, p. 399.

with revenue of approximately $412,000,000, controlled about 88% of the market; Greyhound, with express revenue of about $33,000,000, had about 7%; and all other motor carriers of passengers combined, with express revenues of approximately $21,000,000, had most of the balance.[12]

Given this market dominance, it is evident that the proposed acquisition would probably violate section 7. Under *United States* v. *Philadelphia National Bank*, 374 U.S. 321, REA and Greyhound would bear a heavy burden in attempting to prove the contrary, for there the Court held that a 30% market share was "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.*, at 363, 364. See also, *e.g.*, *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; *United States* v. *Von's Grocery Co.*, 384 U.S. 270.

The facts of record in this case strongly reinforce the inference that competition would be lessened. To recapitulate briefly, Greyhound began with an intention of securing a majority stock interest in REA and still harbors that purpose, but is willing to wait until the opposition of a few REA stockholders abates; in the meantime, Greyhound is

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[12] We do not represent that these figures are absolutely accurate. As we have indicated (*supra*, note 11), REA derives some of its revenue from transportation of heavy shipments rather than from traditional express transportation, so that the REA gross revenue figure used above might have to be modified accordingly. Moreover, some motor carriers of freight hold express certificates, and we were not able to locate express revenue data as to them. Finally, United States parcel post is perhaps a competitive factor, limited by relative speed of delivery, size and weight restrictions, and commodity limitations. However, the adjustments in market share that these factors might require would hardly affect the Clayton Act question. The Commission surely would not deny that REA and Greyhound overshadow all other carriers of express. At the 1966 congressional hearings referred to in note 11, *supra*, the Chairman of the Commission characterized REA as "the largest transporter of express and small shipments," *id.*, at page 468; and the Commission did not respond to our invitation in the lower court to adduce any additional figures from its files if it thought they might affect the Clayton Act analysis.

satisfied that a 20% stock interest and a 20% representation on the REA Board—which cannot be modified without Greyhound's consent—will serve its purpose, since that purpose is shared by REA management, directors, and holders of over 80% of REA's stock; and that purpose is to effect a consolidation of REA and Greyhound express activities.

Even without specification as to the type of "consolidation" envisioned, this intercorporate arrangement predictably would mute competition between REA and Greyhound, and, in view of their market strength, would impair the competitive position of others and tend toward monopoly. Moreover, the "Memorandum of Understanding" between the two companies indicates, in brief, that REA is to use Greyhound transportation, supporting services, and facilities instead of its own or that of third parties where that appears most beneficial, and that Greyhound is to do the same. That there will no longer be active competition is strikingly evidenced by the fact that the two companies contemplate using the same salesmen and sales agency. Such an elimination of competition will drastically curtail the opportunity of third party express carriers to compete with Greyhound for REA business, with REA for Greyhound business, and with both of them for the patronage of the public.

Moreover, such an impairment of the position of the competitors of REA and Greyhound would probably have an extremely serious effect. Thus, for example, the motor bus protestants alleged that the combination of REA and Greyhound express activities would make it impossible for them to maintain the existing level of their express activities, and that this in turn would cripple their passenger operations, since the profitability of many of those operations is dependent upon express revenue (*supra*, pp. 8-10, 20-21).[13]

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[13] These allegations were not countered by any party nor were they held

In sum, the circumstances disclosed by the record establish that, if the Commission based its decision upon the notion that no significant section 7 problem was presented, the Commission surely erred.

2. *The scope of section 20a(2).* Our basic position, as we have noted, is that, under the "public interest" and "lawful object" standards of section 20a(2), the Commission was not free to approve the REA-Greyhound transaction in the face of a record disclosing a serious section 7 problem. While the Commission did not state its views as to the proper scope of a section 20a(2) proceeding, it is conceivable that the Commission accepted REA's contention that under section 20a(2) it should scrutinize only the fiscal soundness of the proposed transaction and should not consider the legality of the transaction under section 7. But, as we show in this portion of our brief, such a narrow conception of the range of factors relevant to a section 20a(2) determination is not supported either by sound policy, by the language of the statute, by its legislative history, or by related precedent.

The common sense of the matter, first of all, is clear: Since the Congress has, by virtue of section 11 of the Clayton Act,

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unfounded by the Commission. Independent proof of their accuracy is available from sources of which this Court may take judicial notice. Thus, in the 1966 congressional hearings referred to in note 11, *supra* (p. 442), a Vice President of Greyhound, speaking for all intercity bus carriers, stated: "For over 30 years the intercity bus industry has been supplying a steadily increasing volume of expedited package express service, which currently accounts for about 10 percent of the total revenues of the carriers. The intercity bus industry furnishes the only means of public line-haul transport for hundreds of communities which, for economic reasons, the railroads and airlines do not serve . . . . *Much of this essential service provided by buslines particularly that for smaller communities, is noncompensatory and could not possibly be continued were it not for supplementary revenues derived from such services as package express.*" (Emphasis supplied.) Moreover, the 1965 reports filed with the Commission by appellant motor bus companies reveal that 14.33% of their gross revenue was derived from package express service, and that this sum amounted to over twice their net profit after taxes and was substantially equivalent to their net profit before taxes.

directed that the Commission "shall issue . . . a complaint" "whenever [it] shall have reason to believe" that there may be a violation of section 7 of that Act by carriers subject to its jurisdiction, it would hardly be sensible to conclude that the Congress also intended that the Commission be free to approve a securities issue that might very well violate section 7 without even considering whether there would be such a violation.

Next, the plain language of the statute—the "public interest" and "lawful object" standards—forecloses such a discordant reading of the congressional purposes reflected in section 20a(2) and section 11. Section 20a(2) is cast in the broadest terms and clearly reflects an intention to extend the Commission's responsibility to determining whether a proposed stock transaction would violate another statute the Commission is bound to enforce—section 7 of the Clayton Act.

Moreover, nothing in the legislative history of section 20a(2) detracts from this conclusion. It is true, to be sure, that the primary concern of the Congress in enacting section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation; but we have not discovered a single item of legislative history evidencing a legislative purpose to restrict the Commission's inquiry to fiscal considerations—an intent that would have been quite at odds with the broad language chosen by the Congress.

Finally, both court and Commission decisions in related areas strongly support a liberal, rather than a restrictive, reading of section 20a(2). There are a number of judicial decisions under other statutory provisions involving the question whether the term "public interest" or its equivalent, when used as a standard of administrative action, requires the agency to evaluate the impact of its action upon competition. Every such decision that we have been able to discover arrives at the same conclusion: The agency may not ignore the policies of the antitrust laws.

In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, this Court established the rule that governs the Commission in a section 5 proceeding, in which the Commission must decide whether a proposed merger, consolidation, or acquisition of control is "consistent with the public interest." That rule, in brief, is that "the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." *Id.*, at 87. Thus, while the Commission is not bound under section 5 to disapprove a merger even where it has adverse effects on competition, it is not free to ignore those effects in arriving at its decision. See also, *e.g.*, *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154; *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173; *Navajo Freight Lines, Inc.* v. *United States*, 186 F. Supp. 377, 381 (D. Colo. 1960) ("The term 'public interest,' as used in § 5(2)(b), embraces the interests of competing carriers.").[14]

In *California* v. *Federal Power Comm'n*, 369 U.S. 482, this Court described in similar terms the obligation of the Federal Power Commission in passing upon merger appli-

[14] For cases in which the Commission has denied applications on the basis of adverse impact on competition, see, *e.g.*, *Wheeling & L.E.Ry. Co. control*, 254 I.C.C. 505, 511 (1943) ("the relations between [the parties] are such as to suggest, at least, a disregard for the spirit and intent of [the Clayton] Act and for the public interest it is designed to subserve"); *Illinois Greyhound Lines, Inc.—Purchase—Southern Ltd.*, 38 M.C.C. 641 (1942) (proposed purchase would effecuate a virtual monopoly); *Southwestern Greyhound Lines, Inc.—Merger*, 39 M.C.C. 721 (1944). Applying a similar approach, the Commission considers the impact on competition in passing on applications for certificate authority. See, *e.g.*, *Pan-American Bus Lines Operation*, 1 M.C.C. 190 (1936); *Mt. Hood Stages, Inc., Extension—Boise—Salt Lake City*, 44 M.C.C. 535, 548 (1945) ("In our view, it is not in the public interest that this important business should be reserved to a single carrier. Both the courts and the Commission have long recognized that reasonable competition is in the public interest.").

cations where the relevant standard is the "public convenience and necessity." The Court stated: "Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of 'public convenience and necessity' as used in § 7 of the Natural Gas Act is found in the laws of the United States." *Id.*, at 484-485. See also *City of Pittsburgh* v. *Federal Power Comm'n*, 237 F.2d 741, 754 (D.C. Cir. 1956) ("Although the Commission has no power to enjoin conduct as illegal under the Sherman Act or even to declare such illegality, it certainly has the right to consider a congressional expression of fundamental national policy as bearing upon the question of whether a particular certificate is required by the public convenience and necessity.").

As to the Federal Communications Commission, this Court has stated that, in directing the Commission to discharge its licensing authority in terms of the "public interest, convenience, or necessity," "Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraint upon commerce." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224. See also *Mansfield Journal Co.* v. *Federal Communications Comm'n*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("It is certainly not in the public interest that a radio station be used to achieve monopoly."); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 ("There can be no doubt that competition is a relevant factor in weighing the public interest."). And the same rule governs the Federal Maritime Board. See *Greater Baton Rouge Port Commission* v. *United States*, 287 F.2d 86, 95 (5th Cir. 1961), *cert. den.*, 368 U.S. 985.

Our argument that "public interest" as used in section 20a(2) includes a consideration of the anticompetitive features of a proposed transaction is even stronger than in the

cited cases. In all of them except *McLean*, the agency in question had no authority—and no obligation—to enforce the antitrust provisions relevant to the proposed transactions, whereas the Interstate Commerce Commission *is* responsible for the enforcement of section 7 of the Clayton Act. Moreover, in *McLean* the Court declared an obligation on the part of the Commission to consider the anti-competitive impact of the transaction despite the fact that the Commission under section 5 could grant immunity from the antitrust laws. It would seem that, where the Commission is acting under a provision like section 20a(2) that does not empower it to grant antitrust immunity, the obligation to take the Clayton Act into account would be even clearer.[15]

As to Commission decisions under section 20a(2), we have found none squarely in point. Normally, a section 20a(2) application either is a simple matter of securities issuance without any anti-competitive overtones, or else it is coupled with a merger or acquisition application under section 5 in which event the Commission is, as we have indicated, required to explore the impact of the transaction on competition.

However, there are Commission decisions under provisions cognate to section 20a(2) that fortify our argument respecting the appropriate scope of that section. Perhaps the most significant is *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5 (1948). There the Commission, in construing section 20a(12), 49 U.S.C. 20a(12), which proscribes interlocking directorates in the absence of a Commission finding that "neither public nor private interests will be adversely

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[15] In contrast to section 5(11), section 20a does not authorize the Commission to immunize transactions from the antitrust laws, and accordingly the Commission has no such power. See *California* v. *Federal Power Commission*, 369 U.S. 482. See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351; *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 470; *United States* v. *Borden Co.*, 308 U.S. 188, 198; *United States* v. *RCA*, 358 U.S. 334.

affected," held that no such finding could be made in view of the probable adverse impact of the proposal upon competition. *Id.*, at 17-19, 29, 39, 40-41, 43. As the Commission put it, the applicants "are in effect asking us to sanction . . . a violation of section 7 of the Clayton Act." *Id.*, at 39. Moreover, the Commission declared that section 20a(12) had to be read in light of section 8 of the Clayton Act, which also deals with interlocking directorates.[16]

Other related decisions are those in which the Commission has held that the competitive bidding requirements of section 10 of the Clayton Act, 15 U.S.C. 20, are relevant in passing on applications under section 20a(2) of the Interstate Commerce Act for the issuance of securities without competitive bidding. *Columbia Terminals Company—Issuance of Notes,* 40 M.C.C. 288 (1945); *Securities of Western R.R. Co.,* 145 I.C.C. 750 (1928); *Regulations Relative to Bids of Carriers,* 56 I.C.C. 847 (1920); *cf. Securities of Virginia Central Ry.,* 154 I.C.C. 437 (1929).

In sum, the Commission has applied the policy of sections 7 and 8 of the Clayton Act in a section 20a(12) proceeding and the policy of section 10 of the Clayton Act in a section 20a(2) proceeding. The notion that the policy of section 7 of the Clayton Act is not to be applied in a section 20a(2) proceeding simply cannot be squared with these prior decisions of the Commission. Nor must the Court consider whether to accept an irrational discord among these various

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[16] The facts of the *Chesapeake & O. Ry. Co.* case are markedly similar to the facts in the case at bar. The application was for permission for the C&O to exercise voting rights of the 6.2% of the stock it held in the New York Central and to permit two C&O directors to sit on the New York Central board. In terms of the purpose of the application, the C&O spoke of the "establishment of a satisfactory working relationship" and a "closer association," of "greater cooperation and coordination with respect to operating and traffic policies and other activities," of "the deterioration of the New York Central's financial and credit position," of improving "the credit ratings of the New York Central's bonds and mak[ing] it possible to refinance them at lower interest rates," and of introducing "such changes, both in traffic and operating conditions, as will be beneficial to the public interest." 271 I.C.C., at 9, 14-16, 31, 32-33.

statutory provisions because of a long-standing construction by the Commission supporting its decision, for there is none. Rather, the guiding principle should be, as stated by the Commission in *Stock of New Jersey, Indiana & Illinois R.R.*, 94 I.C.C. 727, 729 (1925), that "[i]n any application to us for authority to issue securities we are bound to measure the proposal by the test of public interest in whatever phase that interest may appear to be affected. Consequently it is especially pertinent to our inquiry that any other carrier may be affected, beneficially or adversely, by the thing proposed to be done."

3. *The Commission's obligation assuming arguendo that section 20a(2) does not by its own terms require consideration of section 7 questions.* We briefly make one further point respecting the Commission's statutory responsibilities: Even assuming that the "public interest" and "lawful object" standards of section 20a(2) were for some reason inadequate by themselves to require the Commission to inquire into the anticompetitive effect of a proposed acquisition, nonetheless the Commission abused its discretion in this case by giving section 20a(2) approval without determining whether that action could be reconciled with the Commission's obligation under section 11 of the Clayton Act to enforce section 7 of that Act. Our position comes to this: Where an agency is entrusted by the Congress with the responsibility of enforcing two statutory provisions, and where in the course of a proceeding under one it becomes evident that a violation of the other would probably result if the agency grants the authority sought, the agency may not proceed without making appropriate determinations relating to both provisions.

This principle, which seems unassailable as a matter of reason, has been applied by the Commission in the past. Thus, in *New York, Chicago & St. L. R. Co. Control*, 295 I.C.C. 131 (1955), where the applicant sought a declaratory

order that acquisition of control would not result from the applicant's ownership of 14.8% of the stock of a railroad together with election of two members of the railroad's board of directors, the Commission commenced a proceeding to determine whether the applicant had already violated either section 5 or section 7 of the Clayton Act "in order that all issues may be settled at the same time." *Id.*, at 153; see *id. at* 156-157.

The Commission has also followed this principle of coordinated enforcement of related statutory provisions by holding that, in section 5(2) acquisition or merger proceedings, it should determine whether there had already been an acquisition of control without Commission approval and hence an acquisition illegal under section 5(4). If there has been such a violation of section 5(4), the Commission normally does not grant the section 5(2) application for authorization in the absence of weighty countervailing considerations—an approach that has been approved by this Court. *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 128-129.[17]

Also relevant are those court decisions establishing the rule that a tribunal must not permit itself "to be a vehicle

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[17] See also, *e.g.*, *Lombard Bros., Inc.* v. *United States*, 226 F. Supp. 905 (D. Conn. 1964); *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 43 (1958); *Kerrville Bus Co., Inc.—Purchase—Cook and Amberson*, 50 M.C.C. 349 (1948); *L. & E. Investment Co.—Control—Sooner Freight Lines*, 50 M.C.C. 163 (1947); *Royal Blue Coaches, Inc.—Merger*, 56 M.C.C. 617 (1950); *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415 (1950). Nor is it without interest that, as the last of the cited decisions indicates, Greyhound is no stranger to cases involving illegal acquisition of control. See also *Greyhound Corp.—Investigation of Control—Southern Ltd.*, 45 M.C.C. 59 (1946); *Greyhound Corp.—Control—Florida Motor Lines Corp.*, 45 M.C.C. 83, 98 (1946) (dissenting opinion).

The Commission has taken a similar stance in section 5(1) proceedings where the proposed arrangement involved a discontinuance of operations that would be illegal under section 1(18) unless approved by the Commission. In such circumstances the Commission refused to pass upon the section 5(1) application until accompanied by an abandonment application. See *Escanaba & L.S. R. Co.* v. *United States*, 303 U.S. 315, 318-319.

which has for its purpose the elimination and prevention of competition." *Kobe Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416, 424 (10th Cir. 1952). See also *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U.S. 227, 262; *Kelly* v. *Kosuga*, 358 U.S. 516, 520. Had the Commission applied this rule in the case at bar, it would have inquired whether its action under section 20a(2) might lead to a violation of section 7 of the Clayton Act, for the Commission's section 20a(2) order was the last step, and an indispensable step, in paving the way for what the record strongly indicates will be a violation of section 7.

4. *The relevance of the 60-day Greyhound offer.* As we have indicated (*supra*, p. 23), the lower court believed that the Commission's sole ground for not passing on the section 7 question was that the facts relevant to that question might be affected by the results of Greyhound's 60-day offer to purchase up to an additional 1,000,000 shares of REA stock, and the court concluded that that ground was wholly reasonable.

The court did not indicate precisely what impact it thought the 60-day offer might have. Presumably, however, it believed that pursuant to the 60-day offer either Greyhound might obtain sufficient additional stock that a section 5 "control" proceeding would be held in which the anticompetitive aspects of the intercorporate relationship could be explored,[18] or appellant minority stockholders of REA might purchase any additional stock offered to Greyhound, thereby somehow decreasing the likelihood of a section 7 violation.[19]

Whatever might be said in favor of this theory, it is not

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[18] If Greyhound secured an additional 1,000,000 shares, it would have about 60% of the outstanding stock—1,500,000 shares out of a total of 2,499,188 (R. 3).

[19] If the appellant railroads acquired an additional 1,000,000 shares, together they would hold slightly less than 50% of the outstanding stock—1,211,752 shares out of a total of 2,499,188 (R. 40-41, 3).

available as a justification for the Commission's action in this case because the full Commission gave no reason for its order, so it is impossible to tell upon what theory it relied. And even if the full Commission had adopted Division 3's order, to impute this analysis to the Commission on the basis of Division 3's "not appropriate at this time" phrase is to read too much into those few cryptic words.

Moreover, the analysis is unsupportable. The Commission is required to withhold section 20a(2) approval unless it finds that a proposed transaction is in the "public interest." But in this case the Commission has given its approval without first considering an important issue related to the "public interest" standard. The Commission's procedure here has been aptly described and strongly condemned by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499. There the Commission cancelled a carrier's proposed rate reductions, "though the facts that control the validity of the reduction have yet to be determined," and determination of those facts had been "put off to an indefinite future," leaving the "carrier helpless in the interval." *Id.*, at 510. In affirming an order enjoining enforcement of the Commission's order, the Court held that it had not discharged its responsibility by its "piecemeal action" through which "[r]esponsibility was shifted from the shoulders of the present to the shoulders of the days to come." *Ibid.*

Assuming *arguendo* that the Commission may have the power in some unusual cases to grant section 20a(2) approval without first resolving all factors relevant to the "public interest" and "lawful object" standards,[20] the

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[20] It is true, of course, that the Commission has followed a somewhat analogous procedure with respect to the New York Central-Pennsylvania merger proceeding under section 5(2), in that it authorized consummation of the merger prior to making a final determination as to conditions necessary for protection of other carriers. A three-judge court, over the vigorous

relevant circumstances in this case do not warrant such an extraordinary abstention. The Commission has a statutory duty under section 11 to institute a Clayton Act proceeding "[w]henever the Commission . . . shall have reason to believe" that there is a violation of the Act, and the record before the Commission in this proceeding indicates the probability of such violation. The Commission's duty in such circumstances is clear and is not altered by the possibility of future shifts in stock interests.

This is especially true in cases such as the present one, where approval of the transaction without consideration of the section 7 question might well result in serious, and illegal, damage to competition and competitors. The

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dissent of Judge Weinfeld, refused to enjoin enforcement of the Commission order, *Erie-Lackawanna R. Co.* v. *United States*, 259 F. Supp. 964 (S.D. N.Y. 1966), and this Court recently heard arguments in expedited appeals from that order in *Baltimore & Ohio R. Co.* v. *United States*, No. 642, October Term 1966, and related cases (Nos. 680, 691, 813, 814 and 815). The opinion of the three-judge court underscores both the unprecedented character of that case and its distinction from the instant case:

> "In this truly unique case, *where there is no substantial dispute over the ultimate merits of a Commission-approved merger* and the sole significant legal issue is the propriety of consummation before the protective conditions have been completely determined, judicial responsibility is limited." 259 F. Supp., at 981 (emphasis added).

Here the ultimate merit of the Greyhound acquisition is precisely the subject of dispute, and the Commission's treatment of essential factors concerning that issue is both ambiguous and incomplete. Indeed, this case rather closely approaches what the court in *Erie-Lackawanna* may have envisioned in cautioning that,

> "[t]o be sure, what we have said would in no way cover the hypothetical case, suggested in the dissent but unlikely to be encountered in life, where the Commission approved a merger and left all conditions subject to further consideration." *Id.*, at 975.

It is not without interest, moreover, that, in the appeals in this Court from the order of the three-judge court in *Erie-Lackawanna*, the Solicitor General has opposed the "truncated" administrative procedure followed by the Commission, contending that the substantial problems created for competing carriers "must be resolved by the Commission before the Penn-Central merger is irrevocably consummated." Memorandum for the United States in Nos. 642, 680 and 691, at pp. 19, 30.

record, as we have indicated, establishes that the basic 20% transaction would probably violate section 7, and that the appellant motor bus competitors of Greyhound are especially vulnerable to the type of harm threatened by the coordination of REA and Greyhound express services. If the 60-day offer were to produce no change in the relative positions of the various stockholders, or if Greyhound's holdings were to increase, the anti-competitive threat obviously would not be diminished, but might be augmented. In such circumstances, even if the Commission were to institute a proceeding in the future under section 5 (or perhaps under section 11 of the Clayton Act), much of the damage feared by appellants might be done by the time that proceeding ran its normal, protracted course. To put it differently, the Commission's grant of section 20a(2) approval without consideration of the section 7 question forecloses the type of prophylactic relief that this Court has viewed as the most desirable remedy in dealing with probable Clayton Act violations—an order blocking the acquisition until final adjudication. See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 606 n. 5, citing with approval *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186.

Nor does the possibility that the appellant minority railroads might acquire an additional 1,000,000 shares materially affect the situation. Together they would still not have 50% of the total stock,[21] so that even if they voted as a block there is no assurance that Greyhound's ambitions respecting express service collaboration would be thwarted. Indeed, even if stockholders opposing Greyhound were to have substantial majority control, there would in all probability still be a section 7 violation. Three leading lower court decisions so establish.

In *Briggs Manufacturing Company* v. *Crane Co.*, 185 F.

[21] See note 19, *supra*.

Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960), in *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), and in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953), acquisitions of a 22% interest, a 23% interest, and a 24% interest, respectively, were held violative of section 7 despite the fact that the company whose stock was being acquired was vigorously opposed to the acquisition. In each of these cases, the court placed particular stress upon the desire of the acquiring company ultimately to gain a majority interest, and upon the fact that even its minority interest would enable it to place a representative upon the board of directors. "[W]ith two sympathetic representatives on the Board, Crane will have driven the wedge in its attempts to gain control of Briggs' assets." 280 F.2d, at 750.[22] See also *Chesapeake & Ohio Railway Company Purchase*, 271 I.C.C. 5 (1948) (6.2% stock interest coupled with board representation.)

Moreover, once the section 20a(2) proceeding is terminated, the appellants may be without recourse with respect to the probable section 7 violation. Of course, if Greyhound secures majority control a section 5 proceeding should be inevitable; and even if there is no change in the *status quo* as a result of the 60-day offer, appellants might ultimately be able to secure a section 5 proceeding even though it is clear that Division 3 does not agree with appellants' contention that the basic 20% interest is sufficient to confer

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[22] To the same effect: "Section 7 includes within its scope a percentage interest sufficient to elect nominees to the Board of Directors." 185 F. Supp., at 184. Placing a nominee upon the board would "limit the effectiveness of the competition." 152 F. Supp., at 394. The presence of a representative on the board "would create a situation in which Benrus would have power to discourage the vigor of competition by Hamilton and so to embarrass and impede Hamilton's management that it might well be driven to unwanted collaboration or to a merger as the least of two evils." 114 F. Supp., at 314.

"control" upon Greyhound (see *infra*, pp. 50-51). However, if minority stockholders, rather than Greyhound, were to secure substantial additional stock interests, it seems clear enough from Division 3's order that the Commission would not require a section 5 proceeding. Still, as we have indicated, there would be a section 7 violation. Nor could appellants turn to the courts, since section 16 of the Clayton Act, 15 U.S.C. 26, forecloses judicial relief where the matter is within the jurisdiction of the Commission.[23]

Nor is this a case in which the Commission's only options were either to decline to investigate the section 7 question or to risk having to conduct a second proceeding after expiration of the 60-day offer. If the Commission thought that as an administrative matter it would be preferable to know the results of the 60-day offer before examining the section 7 question, it could readily have denied section 20a(2) approval unless the parties reformed their contract so that the offer would expire prior to the Commission's section 20a(2) determination. Such a revision would simply have required the REA stockholders to decide at an earlier date whether to offer to sell the additional shares to Greyhound, and whether to exercise their first rights of refusal on any stock so offered. There is nothing in the record suggesting that this matter of timing had an important legitimate business purpose, nor is it easy to imagine what such a purpose might be. Indeed, it is possible that the aim of the parties was to secure exactly what the Commission

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[23] While appellants could request the Commission to institute a Clayton Act investigation pursuant to section 11 of that statute, we have discovered no case law suggesting that the denial of such a request would be judicially reviewable. Section 11—which also confers jurisdiction upon the Federal Trade Commission—does not authorize the filing of complaints by private parties, as do provisions such as sections 2 (discrimination), 3 (prejudice), and 5 of the Interstate Commerce Act. And in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25, this Court held that section 5 of the Federal Trade Commission Act, which is similar to section 11, "does not provide private persons with an administrative remedy for private wrongs."

ordered—approval of the establishment of the 20% relationship without scrutiny of its anticompetitive features.

Finally, it is also relevant that the Commission's orders reflect no concern about, or appreciation of, the substantial Clayton Act issue disclosed by the record. The Commission could, for example, have indicated that it was troubled by the possible anticompetitive impact of the proposed transaction, but that it wished to await the outcome of the 60-day offer; and it could have evidenced its concern by imposing protective conditions on its section 20a(2) approval, such as a relinquishment of voting rights and board representation by Greyhound pending further decision by the Commission. The Commission did nothing of the sort, but instead peremptorily brushed aside the section 7 question.

In sum, there is nothing in this case to detract from the conclusion that the Commission, which is obliged under section 20a(2) to safeguard the "public interest" and under section 11 to enforce the Clayton Act, erred in approving the REA-Greyhound transaction without considering whether it would, as the record indicated, probably violate the Clayton Act.

B. *The Commission Erred In Dealing With The Section 5 "Acquisition Of Control" Issue.*

With respect to the section 5 question, as with respect to the section 7 question, the murkiness of the Commission's order presents a threshold problem. The lower court believed that the Commission "did not decide . . . any questions relating to control or competition." (R. 416). Our view that the Commission did make a finding respecting control—a view that, as the petitions for reconsideration before the Commission indicate, was shared at that time by all parties including REA (*supra*, p. 21)—rests upon the following passages of Division 3's order:

"*It further appearing,* That interveners' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

"*It further appearing,* That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York C. & St. L. R. Co. Control,* 295 I.C.C. 703 (714); . ." (R. 200-201).

The lower court did not suggest what these paragraphs represent if not a finding respecting control, and no alternative occurs to us. At the same time, it cannot be gainsaid that an element of confusion is introduced by the prior state-

ment of the Commission that a section 5 proceeding "would not be appropriate at this time" (R. 198), together with the later statement that "nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214 . . ." (R. 201).

The only theory upon which these statements can be reconciled is that the Commission held that, on the facts of record, there would not be an acquisition of "control" by virtue of the basic 20% transaction, but that the section 5 issue could be reconsidered if the 60-day offer resulted in an increase in the REA holdings of Greyhound. If this is a correct reading of the order, the Commission did not err in the same respect that it did in connection with the section 7 issue, *i.e.*, by refusing to consider section 5 at all. But it was mistaken nonetheless, for it applied an erroneous test of "control."

It is established that the term "acquire control" in section 5(2) embraces not only the establishment of a control relationship grounded in legal status such as purchase of a majority stock interest, but also the establishment of any relationship, formal or informal, that "accomplish[es] a significant increase in the power of one [company] over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease[.]" *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169. This broad standard of "control" is grounded upon the statute itself. See section 5(4) ("control or management in a common interest . . . however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . [T]he words 'control or management' shall be construed to include the power to exercise control

or management."); section 1(3)(b) ("such reference [to 'control'] shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control").

On this test, the Court found "control" in *Alleghany* despite the fact that Alleghany owned only 10% of the stock of the New York Central. And on the same test the Court found control in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, where there was no stock ownership at all. The facts relied upon in that case to establish "control and management in a common interest" are quite relevant here, for they included the integration of the terminal facilities of the two companies, their equipment interdependence, and their coordination of trucking operations.[24]

It is clear enough that the Commission in the case at bar did not follow the *Alleghany* and *Gilbertville* standards. Rather, it viewed the case from an angle that might have been proper only if the majority stockholders, the majority of the board, and the management of REA had been opposed to Greyhound's aim to secure "control and management in a common interest." The Commission findings quoted above might be adequate in a case like *New York, C. & St. L. R. Co. Control,* 295 I.C.C. 703 (1958)—the only

[24] For other "control" situations involving little or no stock ownership, see *Hart* v. *Interstate Commerce Commission,* 226 F. Supp. 635 (D. Minn. 1964); *Buckeye Express, Inc.* v. *United States,* 14 Fed. Car. Cases ¶ 81,303 (S.D. Ohio 1960); *Lombard Bros., Inc.* v. *United States,* 226 F. Supp. 905 (D. Conn. 1964); *Greyhound Corp.—Control—Southeastern Greyhound Lines,* 57 M.C.C. 123 (1950) (10% stock interest); *Greyhound Corp.—Investigation of Control—Southern Ltd.,* 45 M.C.C. 59, 77-82 (1946).

decision cited by the Commission—where the efforts of the minority stockholder were viewed with hostility by the majority; but those findings are singularly inappropriate in the case at bar where the majority welcomes the new minority stockholder and promises to cooperate in putting that stockholder's plans for "coordination" into effect. In this connection, it is interesting to note that many of the phrases employed by the Commission respecting the status of the board minority in the case at bar were lifted practically *verbatim* from *New York C. & St. L. R. Co.*, but that the Commission conveniently failed to copy the key words—"It is extremely doubtful . . . that 2 or 3 strong directors could overcome the *unanimous opposition or hostility* of 12 or 13 directors of the caliber normally holding such positions with a major railroad." *Id.*, at 714. In the quite different circumstances of the case at bar, had the Commission dealt with the section 5 issue in terms of the *Alleghany* test whether the transaction would "accomplish a significant increase in the power of [Greyhound] over REA," the result should have been different. The Commission either would have denied the application outright on the ground that the record was ample to show that there would be an acquisition of "control," or at the least the Commission would have embarked upon a further inquiry.

If, on the other hand, our reading of the order is incorrect, and in fact the Commission did not pass on the "control" question, then the Commission erred for fundamentally the same reasons outlined above in connection with the Commission's refusal to consider the section 7 issue. An illegal acquisition of control is, we submit, relevant to the "public interest" and "lawful object" standards of section 20a(2); the record raised a substantial section 5 issue; and the Commission should have decided it before approving the transaction.

C. *The Commission's Order Is Fatally Ambiguous.*

We have already repeatedly observed that, in our view, the Commission's order is not subject to any decently certain interpretation. If we are correct, the order is invalid under section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), which requires the Commission to include in its decisions "a statement of . . . findings and conclusion, as well as the reasons or basis therefore, upon all material issues of fact, law, or discretion presented on the record. . . ." [25] That statutory provision reflects the principle, established in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94, that "the grounds upon which the administrative agency acted [must] be clearly disclosed and adequately sustained." See also *Automatic Canteen Company* v. *F.T.C.*, 346 U.S. 61, 81; *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511.

The order under review, it should be recalled, is not the order of Division 3, but the final order of the full Commission which vacated Division 3's order, reopened the case for reconsideration, and then simply stated that "the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed" (R. 304). See *supra*, p. 22. While it is of course possible that the Commission intended, not simply to affirm the "action" of Division 3, but also to adopt its reasoning, the Commission certainly did not so state: and the Commission set forth no reasoning of its own.

But even if the Commission had adopted Division 3's order in its entirety, the Commission's action would not be saved, for that order is totally obscure.

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[25] The Act applies, of course, to the Commission. *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173, 193-194.

As to the section 7 question, as we have noted, Division 3 said simply that an investigation "would not be appropriate at this time." There is no explanation *why* the Commission so concluded—whether, as REA had argued, section 7 had no place in a section 20a(2) proceeding; whether as REA also had argued, the record did not suggest a section 7 violation; whether, as the lower court believed, the Commission wanted to await the outcome of the 60-day offer; whether the Commission wanted to await the consummation of particular working arrangements between REA and Greyhound; whether the Commission believed that section 20a(2) approval would immunize the transaction; whether the Commission thought the Justice Department, not the Commission, should worry about section 7; or because of some wholly unrelated reason.

As to the section 5 issue, the order is hardly any clearer. As we have observed (*supra*, p. 51), the Commission at one point said that a section 5 investigation would "not be appropriate at this time" and, at another point, ruled that the transaction would not violate section 5. While we have suggested that the Commission may have meant that the basic 20% transaction would not violate section 5 but that the matter could be reconsidered in the future if Greyhound acquired more REA stock, the price of thus harmonizing these apparently conflicting passages in the order is the production of a further inconsistency: Why did the Commission think it proper to pass upon the section 5 question as it related to the basic 20% transaction but not upon the section 7 question?

In sum, this is plainly a case in which the Commission has "shelter[ed] behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the courts] to determine what really lay behind the conclusions. . . ." *Automatic Canteen Co.* v. *F.T.C.*, *supra*, at 81.

D. *The Hearing Question*

The lower court stated that "the main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing" (R. 411), and disposed of that question, so far as one can tell, on the ground that section 20a(6) leaves the question of a hearing to the discretion of the Commission. While appellants do maintain that the Commission erred in not holding a hearing, the lower court entirely misapprehended the "main thrust" of the attack on the order, for the hearing issue is distinctly collateral to the issues we have already discussed.

That is, if the lower court was correct in holding that the Commission was not obliged to consider the section 7 and section 5 issues, then it was indisputably within the Commission's discretion to pass upon the fiscal aspects of the REA proposal without a hearing. On the other hand, if the Commission was obliged, as we maintain, to deal with those issues, then the only action that it could properly have taken without a hearing would have been denial of the application on the ground that REA had not met its burden of proving that the transaction was in the "public interest" and for a "lawful object." The Commission, whether by hearing or not, certainly must assemble a record adequate to support its "public interest" and "lawful object" determinations, and the record as it exists establishes the likelihood of a section 7 and section 5(4) violation.

Conclusion

For the foregoing reasons, the case should be remanded to the Commission with instructions either to conduct a hearing on the questions respecting section 5 and respecting the anti-competitive impact of the transaction, to deny

the application without qualification on the ground that the record does not establish that the transaction would comply with the "public interest" and "lawful object" standards of section 20a(2), or to deny the application with leave for REA to reapply if it reforms its contract with Greyhound so that the outcome of the 60-day offer is fixed before the Commission acts on the section 20a(2) application.

Respectfully submitted,

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APPENDIX

STATUTES

Clayton Act, section 7, 38 Stat. 731, as amended, 15 U.S.C. 18:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate

commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

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Clayton Act, section 11, 38 Stat. 734, as amended, 15 U.S.C. 21:

(a) Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in

which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may, at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

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Clayton Act, section 16, 38 Stat. 737, 15 U.S.C. 26:

* * * * * * *

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. . . .

* * * * * * *

Interstate Commerce Act, section 5, 25 Stat. 380, as amended, 49 U.S.C. 5:

* * * * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicles are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it neces-

sary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad

or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to the public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more

carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

* * * * * * *

(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

* * * * * * *

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in the common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

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(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

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(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this

section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

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(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and

exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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(13) As used in paragraphs (2)-(12) of this section, inclusive, the term "carrier" means a carrier by railroad and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapter 8 of this title; and a water carrier subject to chapter 12 of this title.

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Interstate Commerce Act, section 20a, 41 Stat. 494, as amended, 49 U.S.C. 20a:

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(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

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(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order mod-

ify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

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Interstate Commerce Act, section 214, 49 Stat. 557, as amended, 49 U.S.C. 314:

Common or contract carriers by motor vehicle corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs (2) to (11), inclusive, of section 20a of this title (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater.

Administrative Procedure Act, section 8(b), 60 Stat. 242, 5 U.S.C. 1007(b):

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) th appropriate rule, order, sanction, relief, or denial thereof. . . .